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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 706

RAY S. KALWAJTYS, WALTER J. KALWAJTYS, BERNICE KALWAJTYS, and WERONIKA KALWAJTYS, individually and as co-partners doing business as GENERAL PRODUCTS,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In The

Supreme Court of the United States

October Term, A. D. 1956.

No.

RAY S. KALWAJTYS, WALTER J. KALWAJTYS, BERNICE KALWAJTYS, and WERONIKA KALWAJTYS, individually and as co-partners doing business as GENERAL PRODUCTS,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Ray S. Kalwajtys, Walter J. Kalwajtys, Bernice Kalwajtys, and Weronika Kalwajtys, individually and as co-partners doing business as General Products, pray that a writ of certiorari issue to review the judgment of the United States of Appeals for the Seventh Circuit, entered in the above entitled cause on October 30, 1956, and the Final Decree affirming and enforcing order to cease and desist entered November 7, 1956.

OPINIONS BELOW

The Initial Decision of the Hearing Examiner (R. 38-45) is unreported and is printed in Appendix B hereto, *infra* pp. 24-32. The Opinion of the Federal Trade Commission (R. 49-53) is not reported, and is printed in Appendix B hereto, *infra* pp. 33-38. The Opinion of the United States Court of Appeals is reported in 237 F. 2d 654, and is printed in Appendix B, hereto, *infra* pp. 39-44.

JURISDICTION

The judgment of the United States Court of Appeals was entered October 30, 1956, and the Final Decree affirming and confirming order to cease and desist was entered November 7, 1956. The jurisdiction of this court is invoked under 68 Stat. 928 (28 U.S.C. Section 1254 (1)) and Section 5 of the Federal Trade Commission Act, 38 Stat. 717 (15 U.S.C. Section 45.)

QUESTIONS PRESENTED

In the instant case the representations of the Petitioners' salesman were true and misled no one. Nevertheless the Federal Trade Commission found that the representations were false and misleading, based upon the Hearing Examiner's conjecture as to what the prospective customers would deduce from the representations. There was no evidence to support these conjectures and the inferences sought to be drawn find no support either in the language used or in practical psychology. The questions presented are:

1. Under the circumstances above set out, does the Federal Trade Commission have the power under Section 5 of the Federal Trade Commission Act to forbid such representations as "unfair or deceptive acts in commerce?

2. Under such circumstances can the findings of the Federal Trade Commission be sustained as "supported by evidence"?

STATUTE INVOLVED

The Statute involved is Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. Section 45), Sept. 26, 1914, c. 311, § 5, 38 Stat. 719; Feb. 13, 1925, c. 229, § 2, 43, Stat. 939; Mar. 21, 1938, c. 49, § 3, 52 Stat. 111; June 23, 1938, c. 601, § 1107(f), 52 Stat. 1928; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Mar. 16, 1950, c. 61, § 4(c), 64 Stat. 21; c. 745, § 2, 66 Stat. 632. It is printed in Appendix A *infra* pages 15-23.

STATEMENT OF THE CASE

An amended and supplemental complaint was issued by the Federal Trade Commission charging petitioners here, individually and as co-partners doing business as General Products, with false, deceptive and misleading representations in violation of the Federal Trade Commission Act in connection with the sale and distribution of photograph albums and certificates for photographs to be taken at independent studios in various localities (R. 13-19). Stipulation for consent order as to certain charges was entered into and trial was had before a hearing examiner as to the remaining charges (R. 35-37). The Hearing Examiner found against General Products and issued an order requiring them to cease and desist from representing, directly or by implication:

(a) That they sell only to selected persons;

(b) That their albums are given free or without cost;

(c) That the prices at which they regularly or customarily sell their products are promotional or reduced prices (R. 38-45).

General Products appealed to the Commission (R. 46). Their appeal was denied and the findings, conclusions and order of the Trial Examiner were approved and adopted by order of the Commission (R. 48-53).

General Products filed in the United States Court of Appeals for the Seventh Circuit their petition for review seeking to set aside those orders. The United States Court of Appeals for the Seventh Circuit denied the petition ordered the enforcement of the order of the Com-

mission, and entered a final decree affirming and enforcing order to cease and desist.

The facts appear from the following excerpts from the opinion of the Commission:

"Respondents manufacture and sell (among other things) photograph albums, known as Build-A-Book, which is the product involved here. The method of distribution is by salesmen who obtain orders through personal solicitation. As part of the transaction, the salesmen turn over to purchasers, certificates which are to be presented to a designated local studio, with whom respondents have made previous arrangements. These certificates provide that the holders thereof are entitled to receive ten 8 x 10 portraits, one of which may be a family group, the portraits to be made at the rate of two a year at intervals of not less than ninety days. Under the terms of the agreement or understanding, the studio may make a charge of $1.00 for each sitting, if the certificate-holder does not order additional photographs. The price which respondents receive for their album-certificate combination is $39.95, all of which is collected and retained by respondents. (R. 49-50).

"It is not disputed that respondents secured the names of prospective customers by the 'birth lead method.' That is, the names were secured from public birth records.

"The written instructions furnished the salesmen by respondents (See Comm. Ex. 6) contained the following directions as to the sales talk to be employed after the salesman had gained admittance to the home:

" 'I am looking for the John Jones family * * * Mrs. Jones, I am from General Products. We have, in reality, a gift for selected families with (a baby) or (a young child). The reason we check so close is because the gifts

are quite expensive and they have been promised to a selected number of families and, of course, we want to be sure we have the right families'.

"Respondents' evidence is to the effect that the circulation of Ex. 6 was abandoned in 1953. Nevertheless, it was stipulated 'that if the hearing was held, now scheduled in Appleton, Wisconsin, the witnesses called there would testify in substance as follows:

" '(1) That at the time they were approached by a representative from General Products, they were told that they were receiving in reality a gift for selected families with a baby or young child and that there would only be a few of these books placed in the respective areas. (R. 50).

" '(2) That they understood the album to be free and that the charge was made for the photographs.

" '(3) That the price of $39.95 for the album-certificate combination, was a promotional and reduced price.

" '(4) That the album-certificate combination was of the value of $114.50. (R. 51).

• • • •

"Each person accepting respondents' offer was required to pay $39.95. For that, he received one Build-A-Book and certificate which entitled him to have not to exceed 10 pictures taken by a specified photographer, for which the photographer could charge $1.00 each. All the $39.95 went to the respondents. (R. 52).

• • • •

"As found by the hearing examiner:

" 'Respondents' evidence shows that the album has been offered for sale by Marshall Field of Chicago for a price

of $34.50, and that photographs comparable to those offered through respondents' album-certificate combination are being sold in many areas of the United States for a price of $8.00 each, making a total price for 10 photographs, involving 10 separate sittings, of $80.00. This amount added to the $34.50 for the album, equals respondents' claimed value of $114.50.' " (R. 52).

On page 4 of Commission's Exhibit 6 (the written instructions that were furnished the salesmen by respondents) under the words "Reason For This Promotional Offer" the salesman explains what he means by reduced or promotional offer in the following language:

> "You have ten portraits. Nine of them would ordinarily retail at $7.00 each giving us a figure of $63.00, plus one of the ten as you recall may be an expensive family group normally retailing at $17.00 making a total of $80.00 worth of portrait work, plus a $34.50 family album making a grand total of $114.50 worth of material that you actually receive for, as I mentioned before, $3.95 per portrait." (Com. Ex. 6)

There was no evidence that any prospective customer was ever misled by any of the representations made. On the contrary Mrs. Margaret Urbanik who was the only prospective customer called by the Commission testified:

"Q. I believe you mentioned that, it was stated to you that you were receiving an album free?

"A. That is right.

"Q. Was any mention made that a charge was being made for the photographs or anything to that effect?

"A. Oh yes." (R. 98).

REASONS FOR GRANTING THE WRIT

In this case the Federal Trade Commission prohibited as false and deceptive representations of petitioner's salesmen which were true and so clear as to be incapable of misleading anyone. This action was sought to be justified upon conjecture as to the impression that the representations would have upon prospective customers, unsupported by any evidence and in clear contravention of the language used.

The United States Court of Appeals, for the Seventh Circuit, denied the petition to set aside the order of the Commission upon the ground that the meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact to be determined by the Commission.

The effect of the decision is a practical denial of review despite the circumstance that the representations complained of were both true and incapable of misinterpretation. The result is that the Commission may disapprove or approve representations by mere fiat based upon whim or caprice. This is consonant neither with the generic act creating and empowering the Commission, nor with the express provision of the Statute, that the finding of the Commission must be based upon evidence.

The United States Court of Appeals relies upon *Federal Trade Commission* v. *Standard Education Society et al.*, 302 U.S. 112, which has superficial resemblances to the case at bar. The principles of review applied in that case, however, are clearly repugnant to those applied in the instant case. In that case the evidence disclosed that the representations were actually false and that many witnesses were actually misled. The Supreme Court discusses

the falsity of the representations in detail and the evidence of witnesses that were actually misled. In the instant case the representations were true, incapable of misinterpretation and no one was actually misled.

The importance of the decision transcends the mere ruin of the petitioners' business. It must necessarily be applicable to all advertising endeavor in the country, an industry which itself involves billions of dollars each year and upon which a great part of the economy of the nation is based.

It is submitted that the principles involved and the significance of the decision to all advertising endeavor renders it of sufficient importance to warrant review by this Court.

I.

THE REPRESENTATIONS PROHIBITED WERE TRUE AND INCAPABLE OF MISINTERPRETATION.

The first representation complained of was that the proposition was made to "selected families with a (baby (or young child)". It is not disputed that prospective customers were selected by picking from the public birth records the names of families having a baby or young child. (R. 50). The representation accordingly was not only true, it was not subject to any possible misinterpretation. The Commission states, however, that

> "The natural impression made by the sales approach used was that for some reason the prospective purchaser was being specially and individually chosen, rather than that he was only one member of a certain group who, because of the circumstances, would be likely to buy." (R. 51).

No reason is advanced for this extraordinary conclusion.

The next representation complained of is that the album was given free and that the charge of $39.95 was for the pictures. The prospective customer understood what she paid and what she got. The Commission reached the conclusion that the albums were not given free because petitioners retained the $39.95 and were not financially interested in the picture taking business. (R. 52). It is incredible that the prospective customer would have cared or even have adverted to how the $39.95 was divided between the petitioners and the photographers. The representation was true and could not have been misunderstood.

The third representation complained of is that the price of $39.95 was a reduced or promotional price. The salesman explained in detail to the prospective customer that what he meant by promotional or reduced price was that if the album or photographs were purchased elsewhere at retail, the usual aggregate price of the materials would be $114.50 (Com. Ex. 6, p. 4). This was true and the Commission expressly so found (R. 52).

All of the representations made were not only literally true, but were true in the only sense in which they could have been understood by the prospective customer.

II.

THERE WAS NO EVIDENCE TO SUPPORT THE FINDING OF THE COMMISSION.

There is no controversy as to what the representations were. There is no contradiction in the record that the representations were true. There is no evidence that any prospective customer was misled. The only controversy is as to what inferences the prospective customer might have drawn from what was said. Even here, perhaps, some presumption must be indulged in favor of the conclusion

of the Commission although it is difficult to see how the Commission is in any better position to read the minds of the prospective customers than anyone else. But here the conclusion of the Commission is utterly unreasonable and the conclusion of the Commission as to what the prospective customer thought bears no relationship to the words used.

Section 5 of the Federal Trade Commission Act (15 U.S.C.A., Section 45) provides that:

> "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

It further provides that:

> "The findings of the Commission as to the facts, as supported by the evidence, shall be conclusive."

The representations complained of were not unfair or deceptive in fact and there was no evidence whatever that any prospective customer was in fact misled by them. The Commission's conclusion that the words used had the tendency or capacity to mislead the prospective customer can be supported only by conjecture as to what the prospective customer would infer from the words used. These postulated inferences not only bear no relation to the words used, but approach the merely fanciful. If the instant decision is to be taken as law, the Commission may approve or disapprove advertising statements of any character despite their truth and without any reference to what the prospective customer would in fact believe from the words used. This grossly exceeds the powers vested in the Commission by the Act, and contravenes the requirement that the findings of the Commission must be based upon the evidence.

III.

THE PRINCIPLES OF REVIEW APPLIED BY THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT IN THE INSTANT CASE ARE NOT COMPATIBLE WITH THOSE APPLIED IN THE CASE OF FEDERAL TRADE COMMISSION v. STANDARD EDUCATION SOCIETY, ET AL., 302 U.S. 112.

In the case of *Federal Trade Commission* v. *Standard Education Society, et al.*, 302 U.S. 112, (Appendix C) *infra* pages 45-54, the representations were actually false. In that case it was represented to prospective customers that the seller was selecting a small list of "well connected representative people in various localities" in order to present them with the encyclopedia. The representation was that prospective purchasers had been selected by reason of "their prestige and influence". This representation was untrue.

It was further represented that the regular price of the encyclopedia and the extension service was $150 and sometimes even as high as $200; that the price of $69.50 was simply the price of the extension service and that the encyclopedias were given free. It was further represented that the price of $69.50 for both the encyclopedias and the extension service was a reduced price. These representations were untrue since the regular price of the books and ertension service was never $150 or $200, but simply $69.50. In addition, many witnesses testified that they were actually misled by this representation. As Mr. Justice Black says, at page 117:

> "Testimony in the record from citizens of ten States —teachers, doctors, college professors, club women, business men—proves beyond doubt that the practice was not only the commonly accepted sales method for respondents' encyclopedias, but that it successfully deceived and deluded its victims."

In the case of *Federal Trade Commission* v. *Standard Education Society, et al.*, 302 U.S. 112, the order of the Commission was sustained because the representations were in fact false and actually misled many people as appears from the evidence. In the instant case the United States Court of Appeals for the Seventh Circuit, approved the order of the Commission despite the fact that the representations were true and no one was actually misled.

IV.

THE EFFECT OF THIS DECISION IS OF SUCH IMPORTANCE THAT IT MERITS REVIEW BY THIS COURT.

While the opinion of the United States Court of Appeals for the Seventh Circuit is phrased in conventional language, its effect as applied to the instant case is to hold that the Commission's Opinion will be sustained despite the circumstance that the representations are true and are not misunderstood by any one. The Court does not advert to the remarkable conjectures made by the Commission as to the meaning of the words used to the prospective customer. The result is that the Commission may approve or disapprove words used based solely upon the subjective reaction of the Hearing Examiner and without reference as to whether those reactions are fairly justified from the language used.

The impact of such a decision upon the advertising business of the whole country can scarcely be over estimated.

Under this decision the Commission may approve or disapprove advertising copy without the assignment of any objective standards whatever. Over Nine Billion Dollars was expended for advertising in the United States during the year 1955 (Printers Ink Advertisers Guide to Marketing for 1957, Page 41.) Certainly it was not the intention

of Congress to vest in the Commission the power to approve or disapprove all advertising copy by mere fiat based solely upon subjective standards. Certainly it was not the intention of Congress to give us an Administrative body that can function on the subjective reaction of its members rather than upon application of evidence to objective standards.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MANDEL L. ANIXTER
ARTHUR ABRAHAM
Attorneys for Petitioners.

APPENDIX A

Section 5 of Federal Trade Commission Act.
U.S.C.A. Title 15, Section 45.

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

(2) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

(3) Nothing contained in this section or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect

in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair, competition and is actionable at the suit of any person damaged thereby.

(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as described in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

(6) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 227(b) of Title 7, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce. As amended July 14, 1952, c. 745, § 2, 66 Stat. 632.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41-46 and 47-58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such

time then until the transcript of the record in the proceeding has been filed in a circuit court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript

of the entire record in the proceeding, including all the evidence taken and the report and order of the Commission. Upon such filing of the petition and transcript the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, evidence, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) The jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the circuit court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the tme it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; order modified or set aside by Court of Appeals

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

Penalty for violation of order

(l) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense. Sept. 26, 1914, c. 311, § 5, 38 Stat. 719; Feb. 13, 1925, c. 229, § 2, 43 Stat. 939; Mar. 21, 1938, c. 49, § 3, 52 Stat. 111; June 23, 1938, c. 601, § 1107(f), 52 Stat. 1028; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107; Mar. 16, 1950, c. 61, § 4(c), 64 Stat. 21.

APPENDIX B

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 6211

INITIAL DECISION.

By Abner E. Lipscomb,
Hearing Examiner.

On September 17, 1954, the Federal Trade Commission issued its amended and supplemental complaint in this proceeding, charging the Respondents with false, deceptive and misleading statements and representations and unfair methods of competition, in violation of the Federal Trade Commission Act, in connection with the sale and distribution of photographic albums and certificates for photographs to be taken at independent studios in various states of the United States.

On October 25, 1955, Respondents submitted an amended answer denying the principal charges of the complaint, which was thereafter modified by a further amendment on the record during the course of the hearing. Subsequently, a Stipulation For Consent Order as to the allegations of Paragraph Seven of the amended and supplemental complaint, relevant to Respondents' alleged practice of inducing persons to breach their contracts of purchase with Respondents' competitors, was entered into by Respondents and counsel supporting the complaint, which removed these allegations from controversy.

Evidence relative to the issues raised by the other allegations of the complaint was duly received in the record, and forms the basis for the factual findings and conclusions relative thereto which are herein made.

1. Respondents Ray S. Kalwajtys, Walter J. Kalwajtys, Bernice Kalwajtys and Weronika Kalwajtys, are individuals and co-partners doing business as General Products, with their office and principal place of business located at 4234 North Lincoln Avenue, Chicago, Illinois.

2. As admitted by Respondents in their answer, and as shown by the evidence of record, Respondents are now, and for more than two years last past have been, engaged in the sale and distribution of photograph albums, together with certificates for photographs to be taken at independent "associate" studios. In the course and conduct of their said business, Respondents have caused their photograph albums, when sold, together with the certificates, to be transported from their place of business in the State of Illinois to purchasers thereof located in various other States. They maintain, and at all times mentioned in the complaint have maintained, a course of trade in said products in commerce among and between the various states of the United States. Their volume of trade in said commerce has been and is substantial. Respondents also admit their further engagement in commerce, in that they transmit various instruments of a commercial nature to their customers located in states other than the State of Illinois and receive like instruments from said customers.

3. At the present time, and during the period of time covered by the allegations of the complaint, Respondents are and have been in direct and substantial competition with other corporations, firms and individuals engaged in the sale and distribution of photograph albums, together

with certificates, for photographs to be taken at independent studios.

4. In connection with, and as a part of, their business, Respondents have entered into agreements or understandings with a large number of photographic studios, located in all or most of the states of the United States, whereby said studios have agreed to honor certificates for photographs issued to purchasers of Respondents' albums, the designation of which is Build-A-Book. These certificates provide that the holders thereof are entitled to receive ten 8 x 10 portraits, one of which may be a family group, the portraits to be made at the rate of two a year at intervals of not less than ninety days. Under the terms of the agreement or understanding, the studio may make a charge of $1.00 for each sitting, if the certificate-holder does not order additional photographs. The price which Respondents receive for their album-certificate combination is $39.95. The album is designed to hold as many as 100 photographs. In the course and conduct of their business, Respondents employ a large number of salesmen who obtain orders by door-to-door solicitation. Purchasers of Respondents' Build-A-Book generally are young parents with one or more children.

5. In the course and conduct of their business, as aforesaid, Respondents, through statements made in various advertising media, on certificates issued to customers, and by means of oral statements made by their sales representatives, have made, directly or by implication, representations which are found to be misleading and deceptive, as follows:

(1) At times when prospective purchasers have been approached by Respondents' representative, they have been told that they were to receive a gift of an album,

which was being presented only to selected families with a baby or young child, and that only a few of such albums woud be given in their area. In truth and in fact, Respondents' prospective purchasers were selected merely on the basis of their belonging to a class of families who, because they had young children, were naturally interested in purchasing pictures of their children and an album to contain them. The names of such prospects were in fact secured from public birth records. The idea of special selection was made more deceptive by the assertion that only a few of the albums were to be placed in an area. The number of albums "placed" in any given area was in fact limited only by the number of possible purchasers and the ability of the salesmen to sell the albums.

(2) Respondents' representatives told prospective purchasers that the album was to be free, and that a charge was to be made for photographs to be taken thereafter. In actuality the albums were not given free, because the purchasers thereof were required to pay $39.95 to Respondents for the combination of album and certificates entitling them to purchase photographs, for which they were later charged, by the studio taking the pictures, at the price of $1.00 each, unless they ordered more than one photograph, in which event they were to receive one photograph without charge on paying the studio's regular price for the remaining photographs ordered. Therefore, Respondents' charge of $39.95 was in large part the price of the album, which, accordingly, was not in fact free.

(3) Respondents' prospective purchasers were also told that a price of $39.95 was being charged for the album-certificate combination, which was a promotional and reduced price, the album-certificate combination being represented as having the value of $114.50. Inasmuch as the evidence shows that the album-certificate combination was

usually and customarily sold for the price of $39.95, such price was not promotional or reduced.

On the other hand, the latter part of the above representation, to the effect that the album-certificate combination is of a value of approximately $114.50, is hypothetically possible. Respondents' evidence shows that the album has been offered for sale by Marshall Field of Chicago for a price of $34.50, and that photographs comparable to those offered through Respondents' album-certificate combination are being sold in many areas of the United States for a price of $8.00 each, making a total price for 10 photographs, involving 10 separate sittings, of $80.00. This amount, added to the $34.50 for the album, equals Respondents' claimed value of $114.50.

Because of the natural tendency of parents, when purchasing photographs of their children, to buy more than one print of each sitting, the hypothetical value of $114.50 will seldom be received by purchasers of Respondents' album-certificate combination. That value, however, may actually be realized by the purchaser if he is willing to comply strictly with Respondents' terms of sale: that is, to purchase only one print of each sitting, and to allow the pictures to be taken at the rate of two sittings per year for a period of five years.

(4) Some of such prospective purchasers were informed that they would receive a natural gold tone finish portrait. The record shows that Respondents' photographs were not and are not natural gold tone finish, but instead are ordinary sepia finish prints.

6. The use by Respondents of the false, deceptive and misleading statements and representations and unfair methods of competition, as herein found, had the tendency and capacity to mislead and deceive a substantial portion

of the purchasing public into the erroneous and mistaken belief that such statements and representations were true, and to induce the purchasing public to purchase substantial quantities of Respondents' album-certificate combinations as a result thereof. Consequently, substantial trade in commerce has been unfairly diverted to Respondents from their competitors, and substantial injury has thereby been done to competition in commerce.

The aforesaid acts and practices of Respondents, as herein found, are all to the prejudice and injury of the public and of Respondents' competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

7. As previously stated, Respondents, on March 11, 1955, entered, with counsel supporting the complaint, into a "Stipulation For Consent Order As To Paragraph Seven Of The Amended And Supplemental Complaint", in which Respondents identify themselves as above shown. They also admit therein all the jurisdictional allegations set forth in the complaint, and stipulate that the record herein may be taken as if the Commission had made findings of jurisdictional facts in accordance therewith.

All parties agree that the answers filed by Respondents on September 10 and October 25, 1954, insofar as they relate to Paragraph Seven of the ameded and supplemental complaint, be withdrawn, and for all legal purposes said answers, insofar as they so relate to Paragraph Seven of the amended and supplemental complaint, will hereafter be regarded as withdrawn. As to the allegations contained in said Paragraph Seven of the complaint, all parties expressly waive any further hearings before a Hearing Examiner or the Commission, the making of findings of fact

or conclusions of law by the Hearing Examiner or the Commission, the filing of exceptions and oral argument before the Commission, and all further and other procedure before the Hearing Examiner and the Commission to which the Respondents may be entitled under the Federal Trade Commission Act or the Rules of Practice of the Commission. Respondents agree that the order contained in the Stipulation For Consent Order shall have the same force and effect as if made after a full hearing, presentation of evidence, and findings and conclusions thereon, and specifically waive any and all right, power or privilege to challenge or contest the validity of the provisions of the order entered in accordance with this stipulation.

It is also agreed that this stipulation, together with the complaint, shall constitute the entire record in this proceeding, upon which the initial decision, insofar as it relates to the allegations contained in Paragraph 7 of the amended and supplemental complaint, shall be based. The stipulation sets forth that the complaint herein may be used in construing the terms of the aforesaid order, which may be altered, modified, or set aside in the manner provided by statute for orders of the Commission.

The stipulation further provides that the signing of the "Stipulation For Consent Order As To Paragraph Seven Of The Amended And Supplemental Complaint" is for settlement purposes only, and does not constitute an admission by Respondents that they have violated the law as alleged in said paragraph of the complaint.

8. In view of the Stipulation For Consent Order as outlined above, and the fact that the order embodied therein is identical with the provisions of the order accompanying the amended and supplemental complaint which relate

to the allegations contained in Paragraph Seven of such complaint, it appears that such order will, with respect to such allegations, safeguard the public interest to the same extent as could be accomplished by the issuance of an order after full hearing and all other adjudicative procedure waived in said stipulation. Accordingly, in consonance with the terms of the aforesaid stipulation, as to the allegations of Paragraph Seven of the amended and supplemental complaint, and after consideration of the entire record herein as to the remaining allegations of such complaint, the Hearing Examiner accepts the "Stipulation For Consent Order As To Paragraph Seven Of The Amended And Supplemental Complaint", submitted herein; finds that this proceeding is in the public interest; and issues the following order:

It Is Ordered that the Respondents, Ray S. Kalwajtys, Walter J. Kalwajtys, Bernice Kalwajtys and Weronika Kalwajtys, individually and as co-partners doing business as General Products, or under any other name, and respondents' agents, representatives and employees, directly or through any corporate or other device, in connection with the offering for sale, sale and distribution in commerce, as "commerce" is defined in the Federal Trade Commission Act, of Photograph albums or certificates for photographs, do forthwith cease and desist from:

1. Representing, directly or by implication:

(a) That they sell only to selected persons;

(b) That their albums are given free or without cost;

(c) That the prices at which they regularly or customarily sell their products are promotional or reduced prices;

(d) That the photographs provided by Respondents' certificates are of natural gold tone finish;

2. Inducing or attempting to induce purchasers of photograph albums of competitors to breach their contracts with such competitors and to purchase Respondents' photograph albums;

3. Inducing or attempting to induce prospective purchasers to breach their contracts for the purposes of competitive photograph albums and to purchase Respondents' photograph albums by:

(a) Offering to allow as part payment of the purchase price of their own photograph albums any sum paid on the purchase price of the photograph albums of their competitors;

(b) Offering to indemnify such persons against loss which might accrue to them by reason of such breach;

(c) Offering to furnish the services of attorneys to such persons to defend suits brought by Respondents' competitors for the purchase price of their photograph albums;

4. Representing, directly or by implication through their salesmen or employees, or otherwise, that their salesmen or employees are the salesmen or employees of their competitors.

Abner E. Lipscomb
Abner E. Lipscomb
Hearing Examiner.

August 8, 1955.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Docket No. 6211

Commissioners:

John W. Gwynne, Chairman
Lowell B. Mason
Robert T. Secrest
Sigurd Anderson
William C. Kern

OPINION OF THE COMMISSION

By Gwynne, Chairman:

The amended and supplemental complaint charges false, deceptive and misleading statements and representations and unfair methods of competition, in violation of the Federal Trade Commission Act, in connection with the sale and distribution of photograph albums and certificates for photographs to be taken at independent studios in various localities.

Subsequently, a stipulation for consent order as to certain charges was entered into and trial was had on the remaining allegations. The charges settled by the stipulation are covered in Paragraphs 2, 3 and 4 of the order in the initial decision. As to the remaining charges, the hearing examiner found against the respondents and issued an order accordingly.

The challenged portion of the order to cease and desist would prohibit respondents from:

1. Representing, directly or by implication:

   (a) That they sell only to selected persons;

   (b) That their albums are given free without cost;

(c) That the prices at which they regularly or customarily sell their products are promotional or reduced prices;

Respondents manufacture and sell (among other things) photograph albums, known as Build-A-Book, which is the product involved here. The method of distribution is by salesmen who obtain orders through personal solicitation. As part of the transaction, the salesmen turn over to purchasers, certificates which are to be presented to a designated local studio, with whom respondents have made previous arrangements. These certificates provide that the holders thereof are entitled to receive ten 8x10 portraits, one of which may be a family group, the portraits to be made at the rate of two a year at intervals of not less than ninety days. Under the terms of the agreement or understanding, the studio may make a charge of $1.00 for each sitting, if the certificate-holder does not order additional photographs. The price which Respondents receive for their album-certificate combination is $39.95, all of which is collected and retained by respondents.

It is not disputed that respondents secured the names of prospective customers by the "birth lead method". That is, the names were secured from public birth records.

The written instructions furnished the salesmen by respondents (See Comm. Ex. 6) contained the following directions as to the sales talk to be employed after the salesman had gained admittance to the home:

> "I am looking for the John Jones family * * * Mrs. Jones, I am from General Products. We have, in reality, a gift for selected families with (a baby) or (a young child). The reason we check so close is because the gifts are quite expensive and they have been

promised to a selected number of families and, of course, we want to be sure we have the right families".

Respondents' evidence is to the effect that the circulation of Ex. 6 was abandoned in 1953. Nevertheless, it was stipulated "that if the hearing was held, now scheduled in Appleton, Wisconsin, that witnesses called there would testify in substance as follows:

"(1) That at the time they were approached by a representative from General Products, they were told that they were receiving in reality a gift for selected families with a baby or young child and that there would only be a few of these books placed in the respective areas.

(2) That they understood the album to be free and that the charge was made for the photographs.

(3) That the price of $39.95 for the album-certificate combination, was a promotional and reduced price.

(4) That the album-certificate combination was of the value of $114.50.

(5) That representations were made to some of the witnesses that they would receive a natural gold tone finish portrait, when such was not always the case."

Respondents call attention to 57 Corpus Juris 106 where the word "select" is defined as follows:

"Select. A word which, whether we look to its derivation or to its universal use, means to choose and take from a number; to cull; to pick out or take from among a number, to take by preference from among others, to take some particular part or number from a greater."

The real question, however, is what impression did respondents' representations make on the prospective purchaser. It seems clear that the impression sought to be created was that the particular person had been specially chosen and that only a few were chosen. The truth, of course, was that each person was called on, simply because he belonged to a certain class, thought to be good prospects, to wit, the parents of a baby or a child. It is true this class would be smaller than the entire group of the population. Nevertheless, the sales appeal was not made on the basis that all in that class were in fact being called on and no other. Such a selling proposition could easily and clearly have been made had respondents desired to do so. The natural impression made by the sales approach used was that for some reason the prospective purchaser was being specially and individually chosen, rather than that he was only one member of a certain group who, because of the circumstances, would be likely to buy. The representations had the capacity and tendency to deceive and the hearing examiner clearly found them to be misleading and deceptive.

Each person accepting respondents' offer was required to pay $39.95. For that, he received one Build-A-Book and certificate which entitled him to have not to exceed 10 pictures taken by a specified photographer, for which the photographer could charge $1.00 each. All the $39.95 went to the respondents.

It is respondents' claim that the album was given free and that the $39.95 was for the making of the pictures. The written instructions to the salesmen refer to the album as "in reality a gift" and the testimony of the witnesses was that they were told they were receiving the album free. It also appears that respondents manufactured and sold the album and were not financially interested in the picture

making business, except that they owned and operated one studio.

The hearing examiner decided that, in actuality, the albums were not given free, that respondents' charge was in large part the price of the album, which, accordingly was not in fact free.

With this conclusion, we agree. Obviously, respondents' interest was in the sale of the Build-A-Book. It does not appear that they had any other reason to help the photographers except as it contributed to the sale of their products. They collected and kept all the money. If the purchaser, for any reason, did not avail himself of the right to have any picture taken, repondents, nevertheless, were entitled to keep the money. The transaction did not involve a gift of the album as that term is commonly understood. Instead, it was a sale for $39.95 of one album, plus certain contract rights set out in the certificate.

The final question has to do with alleged misrepresentations that $39.95 was a promotional and reduced price.

As found by the hearing examiner:

> "Respondents' evidence shows that the album has been offered for sale by Marshall Field of Chicago for a price of $34.50, and that photographs comparable to those offered through Respondents' album-certificate combination are being sold in many areas of the United States for a price of $8.00 each, making a total price for 10 photographs, involving 10 separate sittings, of $80.00. This amount added to the $34.50 for the album, equals Respondents' claimed value of $114.50."

About all this proves is that an individual purchaser, by following a certain course, might realize a value of $114.50 from his $39.95 purchase. Nevertheless, it appears that the album-certificate combination, with its various possibilities so far as the individual purchaser was concerned, usually and customarily sold for $39.95.

We think the hearing examiner decided the issues correctly. His findings, conclusions and order are approved and adopted as the findings, conclusions and order of the Commission.

Respondents' appeal is denied. It is directed that an order issue in accordance with this opinion.
January 27, 1956.

In the

United States Court of Appeals

For the Seventh Circuit

No. 11721 SEPTEMBER TERM AND SESSION, 1956

RAY S. KALWAJTYS, WALTER J. KALWAJTYS, BERNICE KALWAJTYS, AND WERONIKA KALWAJTYS, individually and as co-partners doing business as GENERAL PRODUCTS,
Petitioners,
v.
FEDERAL TRADE COMMISSION,
Respondent.

Petition to Review and Set Aside Order of Federal Trade Commission.

October 30, 1956

Before DUFFY, *Chief Judge,* LINDLEY and SWAIM, *Circuit Judges.*

DUFFY, *Chief Judge.* This is a petition to review and set aside a cease and desist order of the Commission. The complaint charged petitioners with having engaged in unfair and deceptive acts and practices and unfair methods of competition in violation of the Federal Trade Commission Act. The practices complained of were in connection with the sale and distribution of photograph albums and certificates for photographs.[1]

[1] The complaint contained other charges but a consent order was stipulated as to some. There are also other portions of the Commission's cease and desist order which petitioners are not here contesting.

Petitioners manufacture and sell photograph albums known as "Build-A-Book" which is the product here involved. The method of distribution is by 300 to 350 salesmen who obtain orders through personal solicitation. The names of prospects are obtained from public birth records.

There is no dispute as to the approach used by petitioners' salesmen. Petitioners prepared a very detailed sales presentation which was given to each salesman. A considerable portion of the instructions were to be used verbatim, and the balance closely followed.

A few excerpts from these instructions follow:

"1) Door Opener. The sales man looks at a 3 x 5 card on which he has recorded the name and address of the prospect and says, 'I'm looking for the John Jones Family. * * * Are you Mrs. Jones? * * * Mrs. Jones, I am from General Products. * * * We have, in reality, a gift for selected famlies with (a baby) or (a young child). The reason we check so close is because the gifts are quite expensive and they have been promised to a selected number of families and, * * * we want to be sure we have the right families. I have it here with me so if you have a moment I'll just step in and find out how you want it engraved and I'll show you how to assemble it.'"

"2) In the Home. After gaining admittance to the house and being seated next to the prospect the representative states, 'First of all, Mrs. Jones, I'd like to mention that our combination offer is in reality your gift * * * through an advertising appropriation for new products. You see, we have spent money on advertising for 18 years, the same as other manufacturers who spend millions on Radio, T.V. and magazines, or like cereal companies who spend money for samples left in your doorway.' * * * After some discourse, the salesman is in-

structed to ask 'Ho do you like your Build-A-Book, Mrs. Jones?' "

Then comes the instruction "Certificate Opener" which the salesman is required to memorize. "Now, you are probably wondering why we are giving you this beautiful Family Album as a combination gift. * * * the purpose is this. Each album that we place in the home will bring us from three to five new customers each year. In other words, it is placed with you on an advertising basis. The Family Album is, to us, a showcase in your home. (Explanation that a show case must have portraits). With this in mind we are also going to help you fill your album * * *."

Up to this point the salesman has said nothing to indicate the album is for sale. He next explains the certificates whereby Mrs. Jones can obtain 10 portraits for $39.95, which the salesman states covers labor and cost. He then speaks of a "once in a lifetime combination offer" of the photographs and album for $39.95.

On August 8, 1955 the hearing examiner filed an initial decision containing his findings, conclusions and a cease and desist order. The Commission thereafter denied an appeal and adopted the findings, conclusions and order of the hearing examiner. Among the findings were that the petitioners had represented to prospective purchasers that: (1) they were to receive a gift of an album which was being presented only to selected families with a baby or young child, and that only a few of such albums would be given in the area; 2) the album was free, and that the charge was for photographs to be taken thereafter; 3) the $39.95 price which was charged for the album-certificate combination was a promotional and reduced price. The Commission also found that petitioners' repre-

sentations were false, misleading and deceptive, and that they had the tendency and capacity to mislead and deceive a substantial portion of the purchasing public; that substantial trade in commerce has been unfairly diverted to petitioners from their competitors and substantial injury has thereby been done to competition in commerce. The Commission concluded that the acts and practices of petitioners were to the prejudice and injury of the public and of petitioners' competitors, and constitute unfair and deceptive acts and practices and unfair methods of competition in commerce within the intent and meaning of the Federal Trade Commission Act.

The challenged portion of the Commission's order would require petitioners, in selling albums and certificates for photographs, to refrain from respresenting directly or by implication: a) that they sell only to selected persons; b) that their albums are given free or without cost; c) that the prices at which they regularly or customarily sell their products are promotional or reduced prices.

Petitioners insist the Commission's order should be set aside because the representations made by their salesmen were true. Petitioners say their prospective customers were, in fact, "selected"; that the word "few" is a relative term of great elasticity, and that the price of $39.95 was, in fact, promotional because it was intended to promote the sale of their albums.

A statement may be deceptive even if the constituent words may be literally or technically construed so as to not constitute a misrepresentation. *Rothschild* v. *Federal Trade Commission,* 7 Cir., 200 F. 2d 39, 42; *D.D.D. Corporation* v. *Federal Trade Commission,* 7 Cir., 125 F. 2d 679, 681. The buying public does not weigh each word in an advertisement or a representation. It is important to as-

certain the impression that is likely to be created upon the prospective purchaser. See *Aronberg, et al.* v. *Federal Trade Commission,* 7 Cir., 132 F. 2d 165, 167.

The meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact to be determined by the Commission and should be upheld by a reviewing Court unless arbitrary or clearly wrong. *Rhodes Pharmacal Co., Inc.,* v. *Federal Trade Commission,* 7 Cir., 208 F. 2d 382, 387; *Parker Pen Co.* v. *Federal Trade Commission,* 7 Cir., 159 F. 2d 509, 511. Petitioners do not contest the findings of the Commission that the albums were not, in fact, given free, but contend that no one could have been misled. We think the Commission was warranted in reaching a contrary conclusion.

In *Federal Trade Commission* v. *Standard Education Society, et al.,* 302 U.S. 112, 113-117, the Court approved the Commission's findings that practices quite similar to those involved in the case at bar were false, deceptive and misleading. The Supreme Court held that representing that encyclopedias were a gift made for advertising purposes; that prospective customers were specially selected persons; that the purchasers were paying only for a loose-leaf extension service (and not for the encyclopedia); that the price quoted was a reduced price, were all parts of the same sales plan and the Commission was justified in proscribing such practices.

In *Consolidated Book Publishers* v. *Federal Trade Commission,* 7 Cir., 53 F. 2d 942, 944 this Court sustained a Commission's order which prohibited representations that a few sets of a publication were being given free for advertising purposes when no gift was intended and that purchasers were paying only for a loose-leaf supplement

to a publication or for certain services in connection therewith when, in fact, the price asked covered the book and the services.

We think the findings of the Commission are supported by substantial evidence. We agree with the conclusions of the Commission that petitioners were engaged in unfair and deceptive practices in commerce. The petition to set aside the cease and desist order of the Commission will be denied, and enforcement of the order of the Commission is

ORDERED.

APPENDIX C

FEDERAL TRADE COMMISSION *v.* STANDARD EDUCATION SOCIETY ET AL.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 14. Argued October 18, 1937.—Decided November 8, 1937.

1. The fact that a false statement may be obviously false to those who are trained and experienced does not change its character nor take away its power to deceive others less experienced. P. 116.

2. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. *Id.*

3. Findings of the Federal Trade Commission are conclusive if supported by evidence. P. 117.

4. As part of a scheme for selling an encyclopedia and a loose leaf extension service, respondents falsely represented to prospective purchasers that the books would be given to them free and that they would pay only for the extension service at a reduced price; whereas, in truth, the price charged them was the same as the regular, standard price for both the books and the extension service. *Held*—violative of § 5 of the Federal Trade Commission Act. Pp. 115, 117.

5. An order of the Federal Trade Commission forbade, in the advertising of a revised encyclopedia, the use

of the names of persons, as contributors or editors, who had not consented to such use and and who had neither actually contributed to the publications nor helped to edit them. *Held* properly inclusive of contributors to an earlier work no part of whose contributions had been carried into the revision. P. 117.

6. The Commission's findings, supported by evidence, sustain its order forbidding, in advertisements of a publication, the use of testimonials attributed to persons who did not give them. P. 118.

7. A cease-and-desist order of the Federal Trade Commission directed to a corporation binds those who are in control of its affairs and may properly include them as individuals when there is reason to believe that, if directed to the corporation alone, they will endeavor to evade it. P. 119.

86 F. (2d) 692, reversed in part.

CERTIORARI, 301 U. S. 674, to review the judgment of the court below which modified in part, and reversed in part, an order of the Federal Trade Commission.

Assistant Attorney General Jackson, with whom *Solicitor General Reed* and *Messrs. Hugh B. Cox, Robert L. Stern, W. T. Kelley, Martin A. Morrison,* and *James W. Nichol* were on the brief, for petitioner.

Mr. Henry Ward Beer for respondents.

MR. JUSTICE BLACK delivered the opinion of the Court.

Upon application by the Federal Trade Commission this Court granted certiorari to review that part of a decree of the Circuit Court of Appeals for the Second Circuit which modified in part and reversed in part a "cease and

desist" order of the Commission. 86 F. (2d) 692. The Commission, after service of a complaint, and extensive hearings, made a finding of facts from the testimony and ordered two corporation respondents, and three individuals controlling these corporations, to desist from certain practices used by respondents in furthering the sale of encyclopedias and other books in interstate commerce. The Commission not only found the practices to be "unfair" but also "false, deceptive and misleading." The court below modified and weakened the Commission's order in material aspects, and the questions here are whether the testimony supported all the findings of the Commission, and whether these findings justified the entire order as against all the respondents.

All "unfair" practices found by the Commission related wholly to methods of sale. The Commission's order against respondents was based, in part, upon the following findings:

That fictitious testimonials and recommendations had been used by respondents; that authorized testimonials and recommendations had been exaggerated and garbled; that authorized testimonials for a "previous work" were later used to further the sale of another "work, quite different in form, in material and in purpose." "For the purpose of selling their publications, Standard Reference Work and New Standard Encyclopedia," respondents advertised "a list headed 'Contributors and Reviewers' and . . . In such list they include many who have not been either contributors or reviewers to either the Standard Reference Work or the New Standard Encyclopedia." Respondents sold "their publications at retail to the public by salesmen on the subscription plan" and in carrying out said plan they represented to prospects that they

were selecting a small list of "well connected representative people" in various localities, in order to present them with an "arteraft de luxe edition" of the encyclopedia. Further carrying out respondents' scheme, their agents represented that "they are giving away a set of books; that they are not selling anything; that the books are free; that the books are being given free as an advertising plan . . . that the prospect has been specially selected, and that the only return desired for the gift is permission to use the name of the prospect for advertising purposes and as a reference"; that the "said prospects are paying only for the loose leaf extension service; . . . that the price of $69.50 is a reduced price and that the regular price of the books and the extension service is $150.00, sometimes even as high as $200.00." The statements that the encyclopedia is being given away; that payment is only being made "for the loose leaf extension service"; and that "$69.50 is a reduced price . . . are false, deceptive and misleading, as $69.50 is the regular, standard price" for both the encyclopedia and the loose leaf extension and research privileges.

The Court of Appeals reversed clauses one and three of the Commission's order. These clauses ordered respondents not to represent falsely to purchasers of their publications that the publishing company was giving encyclopedias to them as a gift, and that purchasers were paying only for loose leaf supplements.

The Court of Appeals affirmed clauses two and six of the Commission's order. These clauses ordered respondents not to represent falsely to purchasers that sets of books had "been reserved to be given away free of cost to selected persons" and that the usual price at which respondents' publications are sold is higher than the price "at which they are offered to such purchasers."

It is clear, both from the findings of the Commission, and the testimony upon which they rest, that the practices forbidden in clauses one, two, three and six are all tied together as parts of the same sales plan. As a first step under this plan, salesmen obtained an audience with prospective purchasers by representations made to them that by reason of their prestige and influence they had been selected by the Company to receive a set of books free of costs for advertising purposes. After respondents' agents thus gained an audience by the promise of a free set of books, they then moved forward under the same general sales plan, by falsely representing that the regular price of the loose leaf supplement alone was $69.50, and that the usual price of both books and loose leaf supplements was much in excess of $69.50. The Commission ordered respondents not to engage in carrying out any part of this entire sales plan. However, as the Court of Appeals reversed clauses one and three of the Commission's order, a part of the sales scheme which the Commission condemned as unfair, can yet be carried out by respondents. That is to say—respondents by that reversal, are left free to continue to obtain audiences with prospects and to sell encyclopedias and loose leaf supplements to them, by false representations that the Company gives them a set of encyclopedias free, and that $69.50 paid by them to the Company, is for the loose leaf supplement alone.

In reaching the conclusion that respondents should be left free to engage in that part of the sales scheme prohibited by clauses one and three of the Commission's order, the court below reasoned as follows:

"We cannot take seriously the suggestion that a man who is buying a set of books and a ten years' 'extension service,' will be fatuous enough to be misled by the mere

statement that the first are given away, and that he is paying only for the second. . . . Such trivial niceties are too impalpable for practical affairs, they are will-o'-the-wisps, which divert attention from substantial evils."

The fact that a false statement may be obviously false to those who are trained and experienced does not change its character, nor take away its power to deceive others less experienced. There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious. The best element of business has long since decided that honesty should govern competitive enterprises, and that the rule of *caveat emptor* should not be relied upon to reward fraud and deception.

The practice of promising free books where no free books were intended to be given, and the practice of deceiving unwary purchasers into the false belief that loose leaf supplements alone sell for $69.50, when in reality both books and supplement regularly sell for $69.50, are practices contrary to decent business standards. To fail to prohibit such evil practices would be to elevate deception in business and to give to it the standing and dignity of truth. It was clearly the practice of respondents through their agents, in accordance with a well matured plan, to mislead customers into the belief that they were given an encyclopedia, and that they paid only for the loose leaf supplement. That representations were made justifying this belief; that the plan was outlined in letters going directly from the companies; that men and women were deceived by them—there can be little doubt. Certainly the Commission was justified from the evidence in finding that customers were misled. Testimony in the record from citizens of ten States—teachers, doctors, college professors, club women, business men—proves be-

yond doubt that the practice was not only the commonly accepted sales method for respondents' encyclopedias, but that it successfully deceived and deluded its victims.

The courts do not have a right to ignore the plain mandate of the statute which makes the findings of the Commission conclusive as to the facts if supported by testimony.[1] The courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission. The record in this case is filled with evidence of witnesses under oath which support the Commission's findings. Clauses one and three of the Commission's order should be sustained and enforced.

The seventh clause of the Commission's order forbade the use of names of persons as contributors or editors who had not consented to such use and who had neither actually contributed to the publications nor helped to edit them.

The Court of Appeals upheld this clause except as it might apply to the original contributors to Aiton's encyclopedia saying that "it seems to us not 'unfair' to announce as contributors to the derived works those who have been contributors to the original." Aiton's encyclopedia was published about 1909, and respondents' works represent the result of periodic revisions and expansions of the prior work. The Government concedes in its brief that this clause of the Commission's order does not prevent respondents from representing a person who contributed to the original, as a contributor to their revised publication, if "some of the material originally in Aiton's encyclopedia remained in the new Edition of the revised work." Respondents agree with this interpreta-

[1] Federal Trade Commission Act, Sept. 26, 1914, 38 Stat. 717, U.S.C. Title 15, § 45.

tion. As between these parties, therefore, this clause permits respondents to represent any person as a contributor to their present revised encyclopedia, if a part of his original material has been carried forward to it. If no part of his contribution to Aiton's encyclopedia has been brought forward, he is not a contributor and should not be represented as such. This clause as originally declared by the Commission would, under this interpretation, properly forbid respondents from falsely representing as contributors or editors those who had actually neither contributed to, nor edited, the publications. The decree of the court below modifying this clause is not in accordance with our conclusion, and clause seven of the Commission's order should be enforced.

The Court of Appeals reversed the eighth clause of the order of the Commission. The reason given by the court below for this action was as follows:

"For the eighth, which forbad the use of such testimonials which had not been given by the person whose name was used, we have been able to find no support in the evidence; . . ."

We are convinced that the Commission's findings of fact justified this clause of the order and that the testimony support these findings.[2]

The Court of Appeals entirely excluded respondent Greener from the operation of the Commission's order,

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[2] From paragraphs fourteen and fifteen of the Commission's findings it appears that respondents used the names of various individuals in testimonials and that

"None of these men or this woman ever wrote any testimonial or recommendation of or concerning the New Standard Encyclopedia. The representations that these men and this woman wrote the recommendations for the so-called 'New Standard Encyclopedia' are false, deceptive and misleading."

and partially excluded respondents Stanford and Ward. The Commission had found from the testimony that

"Respondents H. M. Stanford, W. H. Ward, and A. J. Greener are the managers and sole stockholders of respondent Standard Education Society and the managers and sole incorporators of Respondent Standard Encyclopedia Corporation . . . . The Commission concludes and infers from the record in this case and so finds that this corporation was organized by the individual respondent for the purpose of evading any order that might be issued by the Federal Trade Commission against the respondent the Standard Education Society."

There was ample support in the testimony for this finding of the Commission.

The Federal Trade Commission Act (*supra*) gives the Commission power to "prevent persons, partnerships or corporations, . . . from using unfair methods of competition in Commerce."

This Court has held that

"a command to the Corporation is in effect a command to those who are officially responsible for the conduct of its affairs. If they, apprised of the writ directed to the corporation, prevent compliance . . . they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt." *Wilson* v. *United States,* 221 U.S. 361, 376.

Respondents Stanford, Ward and Greener, who are in charge and control of the affairs of respondent corporations, would be bound by a cease and desist order rendered against the corporations. Since circumstances, disclosed by the Commission's findings and the testimony, are such that further efforts of these individual respond-

ents to evade orders of the Commission might be anticipated, it was proper for the Commission to include them in its cease and desist order.

The record in this case discloses closely held corporations owned, dominated and managed by these three individual respondents. In this management these three respondents acted with practically the same freedom as though no corporation had existed. So far as corporate action was concerned, these three were the actors. Under the circumstances of this proceeding, the Commission was justified in reaching the conclusion that it was necessary to include respondents Stanford, Ward and Greener in each part of its order if it was to be fully effective in preventing the unfair competitive practices which the Commission had found to exist. The court below was in error in excluding these respondents from the operation of the Commission's order.

The decree below will be reversed except as to modification of clause ten of the Commission's order, and the cause is remanded with instructions to proceed in conformity with this opinion.

Reversed.

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CITATIONS

Cases:

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416759—57

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 706

RAY S. KALWAJTYS, ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (Pet. 39–44) is reported at 237 F. 2d 654.

JURISDICTION

The final decree affirming and enforcing the order of the Federal Trade Commission was entered on November 7, 1956. The petition for a writ of certiorari was filed on January 22, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether there is substantial evidence to support the findings of the Federal Trade Commission that representations made by petitioners in connection

with the sale of their products were false, deceptive and misleading.

STATUTE INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended, 15 U. S. C. 45, provides in part as follows:

> SEC. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.
>
> * * * * *
>
> (6) The Commission is empowered and directed to prevent persons, partnerships, or corporations * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

STATEMENT

After full administrative proceedings, the Federal Trade Commission found that petitioners had made false, deceptive and misleading statements in connection with the sale and distribution of their products, in violation of Section 5 of the Federal Trade Commission Act. It issued a cease and desist order. The Court of Appeals for the Seventh Circuit unanimously affirmed and enforced the order.

The Commission described petitioners' business as follows (Pet. 34):

> Respondents manufacture and sell (among other things) photograph albums, known as Build-a-Book, which is the product involved here. The method of distribution is by salesmen who obtain orders through personal solici-

> tation. As part of the transaction, the salesmen turn over to purchasers, certificates which are to be presented to a designated local studio, with whom respondents have made previous arrangements. These certificates provide that the holders thereof are entitled to receive ten 8 x 10 portraits, one of which may be a family group, the portraits to be made at the rate of two a year at intervals of not less than ninety days. Under the terms of the agreement or understanding, the studio may make a charge of $1.00 for each sitting, if the certificate-holder does not order additional photographs. The price which Respondents receive for their album-certificate combination is $39.95, all of which is collected and retained by respondents [Pet. 34].
>
> * * * respondents manufactured and sold the album and were not financially interested in the picture making business, except that they owned and operated one studio [Pet. 36–37].

The Commission found (Pet. 26–28)[1] that, in connection with the sale of the album-certificates, petitioners had represented: (1) that the album was being made available to only a few "selected" purchasers in the area with a baby or young child, whereas in fact the names of such families were secured from public birth records and prospective purchasers were selected merely because, as families with young children, they might be interested in purchasing an album and photographs; (2) that the album was given free, the charge being for the pictures, whereas in fact the

[1] The Commission adopted the examiner's findings (Pet. 38).

charge of $39.95 "was in large part the price of the album" (Pet. 27); and (3) that $39.95 was a "promotional and reduced price," whereas in fact it was the price at which the album-certificate combination was "usually and customarily sold" (Pet. 27–28).

In upholding the order, the Court of Appeals stated (Pet. 43) that "[t]he meaning of advertisements or other representations to the public, and their tendency or capacity to mislead or deceive, are questions of fact to be determined by the Commission and should be upheld by a reviewing Court unless arbitrary or clearly wrong." Rejecting petitioners' contention (Pet. 42) that "their prospective customers were in fact 'selected'; that the word 'few' is a relative term of great elasticity, and that the price of $39.95 was, in fact, promotional because it was intended to promote the sale of their albums," the court concluded that the Commission's findings were "supported by substantial evidence," and "agree[d] with the conclusions of the Commission that petitioners were engaged in unfair and deceptive practices in commerce" (Pet. 44).

ARGUMENT

In *Federal Trade Commission* v. *Standard Education Society*, 302 U. S. 112, this Court upheld a Commission cease and desist order directed against advertising misrepresentations, made in connection with the sale of an encyclopedia, which were almost identical with those involved in the instant case. The encyclopedia and a looseleaf supplement were sold together for $69.50. The Court sustained Commission findings that the seller had engaged in "unfair,"

"false, deceptive and misleading" practices (p. 113) by misrepresenting, *inter alia,* that the prospective purchasers had been "selected" by the company (pp. 114, 115); that the encyclopedia was being given away "free," and the $69.50 price was for the supplement (pp. 114, 115–116); and that the $69.50 price was a "reduced price," whereas in fact it was the regular price. We submit that the *Standard Education* case fully supports the Commission's conclusion that petitioners' similar misrepresentations in the instant case likewise violated the Federal Trade Commission Act. See, also, *Consolidated Book Publishers* v. *Federal Trade Commission,* 53 F. 2d 942 (C. A. 7), certiorari denied, 286 U. S. 553; *Thomas* v. *Federal Trade Commission,* 116 F. 2d 347 (C. A. 10).

Petitioners argue (Pet. 8–11), however, that their salesmen's representations "were true and so clear as to be incapable of misleading anyone" (Pet. 8). But "[t]he meaning of advertisements to the public and their capacity to deceive are questions of fact for the Commission to determine, and its conclusions may not be disturbed unless arbitrary or clearly wrong." *Rhodes Pharmacal Co.* v. *Federal Trade Commission,* 208 F. 2d 382, 387 (C. A. 7), modified on other grounds, 348 U. S. 940; *Parker Pen Co.* v. *Federal Trade Commission,* 159 F. 2d 509, 511 (C. A. 7). The court below fully considered petitioners' contentions as to the truth of their representations, and concluded that the Commission's findings as to their misleading character and tendency to deceive were supported by substantial evidence. The correctness of that con-

clusion presents no question calling for further review by this Court.

In any event, the Commission correctly concluded that petitioners' advertising representations were false and deceptive. In the normal and accepted meaning of the language used, persons whose names have been copied from public birth records would not be considered "selected" purchasers, and the regular selling price would not be considered "promotional" because it was intended to promote the sale of the product. The capacity of an advertisement to mislead the public depends upon its overall effect, and it may be misleading even though isolated individual words are literally true. *Rhodes* case, *supra; Koch* v. *Federal Trade Commission,* 206 F. 2d 311, 317, 319 (C. A. 6); *Rothschild* v. *Federal Trade Commission,* 200 F. 2d 39, 42 (C. A. 7), certiorari denied, 345 U. S. 94. The fact that no evidence was introduced to show actual deception of customers is immaterial, since such evidence is not necessary to establish that misrepresentations have a tendency to deceive. *Progress Tailoring Co.* v. *Federal Trade Commission,* 153 F. 2d 103, 105 (C. A. 7); *Northern Feather Works* v. *Federal Trade Commission,* 234 F. 2d 335, 338 (C. A. 3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1956.

No. 706

RAY S. KALWAJTYS, WALTER J. KALWAJTYS, BERNICE KALWAJTYS, and WERONIKA KALWAJTYS, individually and as co-partners doing business as GENERAL PRODUCTS,
Petitioners,

vs.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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October Term, A. D. 1956.

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Reply Brief for Petitioners

Where the representations complained of are not only true, but incapable of misinterpretation, it constitutes mere denial of review to deny the petition on the ground that the meaning of advertising or other representations to the public, or their tendency or capacity to mislead are facts to be determined by the Commission.

Assuming as an abstract proposition that the capacity of representations to mislead are facts to be determined by the Commission, it clearly has no application to the instant case where the conclusion that the representations are false or deceptive is utterly without tenability.

1. The representation that the proposition was made to "selected families with a baby or small child" defined in express and simple terms the only basis for selection. Neither the Commission, the Court of Appeals, nor counsel has suggested anything that the prospective customer might have believed other than the precise and simple truth.

2. The prospective customer understood that she paid $39.95 and received the album and certificates. She could not have been mislead since she necessarily understood precisely what the deal was.

3. Whatever "reduced" or "promotional price" might mean in the absence of clarification, in the instant case the salesman explained in detail to the prospective customer that what he meant by "promotional" or "reduced" price was that if the album or photographs were purchased elsewhere at retail, the usual aggregate price of the material would be $114.50 (Com. Exhibit 6, p. 4). This was true and the Commission expressly so found (R. 52). Whatever presumptions may be indulged in favor of the conclusion of the Commission, it cannot support a determination that is utterly and clearly wrong.

Assuming any relationship between the words used and the impression created in the minds of the prospective purchasers, the representations were true and incapable of deception. The interpretations indulged in by the Commission to support their conclusion of falsity are merely fanciful and find no support either in the language of the representations or ordinary common sense.

Under these circumstances a denial of the Petition to set aside the Order of the Commission, based merely upon a general presumption in favor of the Commission's finding and without any support whatever either in the evidence or in the ordinary meaning of common English words is a substantial denial of review.

Nor does the case of *Federal Trade Commission* v. *Standard Education Society, et al.*, 302 U.S. 112, tend to support the decision in the instant case. On the contrary the principles of review employed in that case are diametrically opposed to those employed in the instant case. In that case the representations were actually false and they were considered in detail to demonstrate their falsity. The Court in its Opinion attaches great weight to the testimony demonstrating that citizens of ten states—teachers, doctors, college professors, club women and businessmen were actually deceived.

In the instant case no one was deceived, and the words themselves, given any reasonable interpretation, were utterly incapable of deception.

Indeed the testimony of the only customer called by the Commission demonstrated that she was not deceived. (R. 98)

There is a very real difference between honesty and dishonesty. That difference may be obscured quite as readily by assuming that all representations are dishonest as by assuming that all representations are honest.

A grave danger lurks in a principle of review which, though expressed in conventional language, has the impact of conclusively presuming that a finding of the Commission must be right no matter how clearly untenable it may be.

It is respectfully submitted that the instant case merits review by this Court and that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit should be granted.

Respectfully submitted,

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